Filed 5/14/19 Olivera St. Apartments v. City of Guadalupe CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

OLIVERA ST. APARTMENTS, LLC et al., Plaintiffs and Appellants, v. CITY OF GUADALUPE, Defendant and Appellant.	2d Civ. No. B286285 (Super. Ct. No. 1484915) (Santa Barbara County)

This lawsuit involves the owner of an apartment building suing for damages allegedly suffered due to the enactment of a city's urgency and permanent zoning ordinance. The ordinance governs square foot requirements per person in boardinghouses. Among other things, the owner sued the city for damages under title 42 United States Code section 1983 (hereafter section 1983) for violating its civil rights under color of law. The owner also petitioned for mandate to void the permanent ordinance as a violation of due process. The jury awarded plaintiff damages. Both parties appeal.

As we shall explain, we reverse the award of damages, but affirm the trial court's denial of mandate.

FACTS

Olivera St. Apartments, LLC, BGV Olivera, LLC, and DTPM Olivera, LLC (collectively Olivera) own a 74-unit apartment building in the City of Guadalupe (City).

The building is located in an R-3 zone. Under the City's ordinance No. 189 (hereafter ordinance 189), in existence since 1980, boardinghouses as well as apartment buildings are permitted in an R-3 zone. A boardinghouse must have a minimum of 500 square feet per person residential occupancy. The building had always been used as an apartment building.

In 2014, the loan on the building was becoming due. Faced with either selling or refinancing, Olivera elected to sell. In August 2014, Olivera entered into a contract to sell the building to SBMD Properties. Steve Scaroni was the principal in SBMD. The contract gave Scaroni until October 28, 2014, to conduct a due diligence investigation. If he cancelled the contract prior to that date, he would be entitled to the return of his $200,000 deposit. If he cancelled after that date, he would lose his deposit. The use of the property for densities of higher than 500 square feet per person, or for any particular purpose, was not a condition of the contract.

Scaroni is a farm labor contractor. He thought that the building had "some profitability" in its current use as apartments for rent to the public. But he wanted to discuss "H-2A" housing with the City. H-2A is a federal visa program that allows agricultural employers to bring in workers from Mexico and Central America to perform seasonal agricultural work. H-2A regulations allow as little as 50 square feet residential occupancy per person.

But nothing in the federal regulations overrides the City's ordinance.

Scaroni met with City officials in September 2014. He informed the City of his plans to use some of the apartments in the building for high-density occupancy under the H-2A program. He did not know how many of the apartments he would need for H-2A housing, nor did he specify a time when he would need them. City officials informed Scaroni that the issue of 50 square feet per person occupancy would fall within the definition of boardinghouse under City ordinances, and would not be allowed in the building's R-3 zone.

Shortly after the meeting with Scaroni, the city council unanimously voted for an urgency ordinance temporarily banning the establishment of boardinghouses within the City. It is undisputed that the impetus behind the urgency ordinance was the high-density occupancy proposed by Scaroni during his meeting with City officials.

A draft permanent ordinance was presented to the city council on October 14, 2014. The draft ordinance contained the same 500 square feet per person limitation as the original ordinance for a boardinghouse as a permitted use, but provided that increased boardinghouse density could be obtained in an R-3 zone by a conditional use permit.

The next day Scaroni cancelled escrow. He said he would not have been interested in purchasing the property if he did not have the option of using it for high-density farmworker housing. He saw no hope of being able to resolve the issue to his satisfaction within the approaching deadline to complete due diligence under the contract.

The city council approved the permanent ordinance on October 28, 2014, and it became effective on November 25, 2014. The permanent ordinance was identical to the draft.

After Scaroni withdrew from the purchase, Olivera refinanced the loan. Olivera's cost to refinance was $142,817.33.

Evidence of Bias

On September 22, 2014, the day prior to the adoption of the urgency ordinance, the City administrator, Andrew Carter, emailed the then mayor, Frances Romero. An acquaintance told Carter upon hearing of Scaroni's plan to house H-2A workers that, "[Y]ou do realize you're going to have a problem with prostitution, don't you?" Romero responded: "Well, I am glad he said it. I would assume there will be other undesired activities as well. [¶]. . .[¶] Just so there is no confusion about where I stand, if we bankrupt the City over this it is worth it. If he gets his way more will come & the community will suffer."

In a community participation forum to discuss the permanent ordinance, one member of the community stated: "We do have a shortage of low-income housing. To push them out to use needed space to really, probably put in three-tiered bunks to house all these people. I don't know what else they're doing, but I would think that leaving it as a low-income possibility for our families rather than turning it into a boardinghouse for single men, which could that bring up some issues. I think we're going in the wrong direction. Thank you."

Another member of the community stated: "I have safety issues. How well [is] this population base going to be screened for tuberculosis, small pox? What's the venue dealing with it? I know for a fact the [Bracero] program, they powdered them like little mosquitos. They came out white from the trains. That's a

statement of fact. Look at the tuberculosis problem we have in the county. We have a guy lost out there they're looking for. AG worker. He sure wasn't working for Walmart."

Mayor Romero stated at the meeting: "What about health checks? That's another question . . . . That's a concern because, you know, as we all know that we do have somebody at large that has a TB that is a, you know -- an agriculture worker."

Other community members expressed concern about permanent residents being displaced by temporary workers and the character of the residential parts of the City being changed. One community member stated: "I know my brethren . . . we like to drink; it's a statement of fact."

Procedural History

Olivera alleged violations of section 1983 on three grounds: discrimination based on a protected class (national origin, familial status, and immigration status); violation of equal protection for targeting a particular property; and violation of substantive due process. Olivera petitioned for a writ of mandate requiring the City to void its permanent ordinance and for damages.

The trial court granted the City's motion for judgment on Olivera's petition for a writ of mandate. The court found that the permanent ordinance meets the rational basis test required for due process and therefore denied mandate.

The jury found that the City intentionally acted to discriminate against a protected class; the City intentionally singled out persons or property in enacting the urgency and permanent ordinances; and the City intentionally violated substantive due process in enacting the urgency and permanent ordinances. The jury awarded Olivera damages in the amount of $142,817.33, its cost of refinancing.

For reasons we cannot fathom, the trial court apparently decided the urgency ordinance was not valid. From this, the court concluded the jury's verdict was based solely on the urgency ordinance. The court also granted the City's motion for judgment notwithstanding the verdict on the alleged equal protection violation, but denied the City's motion as to the remaining bases for the violation.

DISCUSSION

Section 1983

The City contends the trial court erred in determining that Olivera proved infringement of a constitutionally protected right.

Section 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

The elements of a cause of action under section 1983 are: (1) the conduct complained of was committed by a person acting under color of law; and (2) the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 704.)

Discrimination Against Protected Classes

Olivera argues that the classes of people protected from discrimination under the equal protection clause include national origin, familial status, and immigration status. (Citing *Reynaga v. Roseburg Forest Products* (9th Cir. 2017) 847 F.3d 678, 692

[national origin]; *Sugarman v. Dougall* (1973) 413 U.S. 634, [37 L.Ed.2d 853] [alienage]; and *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) ____ U.S. ____ [135 S.Ct. 2507, 2516 [familial status].) It points out that H-2A workers are single men who are by definition not citizens of the United States.

The City's ordinances do not prohibit a property owner from housing H-2A workers or any other class of persons. The ordinances are neutral and apply to everyone. Olivera may rent to H-2A workers or any other class of persons in its apartments so long as it complies with the ordinance's requirement for a minimum number of square feet per occupant.

Olivera apparently bases its claim of discrimination on comments made by City officials and members of the public. Olivera claims such statements show the City was motivated by bias against protected classes in passing the urgency and permanent ordinances.

The City argues that in assessing whether an ordinance violates section 1983, the motive for enacting the ordinance is irrelevant. (Citing *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 185.) Even if motive were relevant, section 1983 requires more than motive. By its terms, section 1983 requires a "deprivation of any rights, privileges, or immunities." Neither Olivera nor Scaroni had the right to use the building for densities greater than one person per 500 square feet before or during the urgency ordinance. The permanent ordinance allows a boardinghouse with the same density as allowed under ordinance 189 as a permitted use and expands the use by allowing a higher density under a conditional use permit. This is an expansion, not a deprivation of rights.

Olivera characterizes the City's defense that no one was deprived of any right as dependent on the validity of ordinance 189. Olivera claims the jury rejected this defense.

First, the validity and interpretation of a statute or ordinance is a question of law for the court, not a question of fact for the jury. (See *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1301.) Second, Olivera's counsel expressly stated that Olivera was not challenging the validity of ordinance 189. Thus, it was not an issue. Third, Olivera presents no cogent argument, much less authority, for why ordinance 189 is invalid.

Moreover, Olivera is wrong that the City's defense depends on the validity of ordinance 189. Even assuming ordinance 189 was invalid, and the premises could have been used as a boardinghouse at a density of 50 square feet per person, it was never so used. The premises have always been used as an apartment house.

The use of the premises did not change before, during, or after the urgency and permanent ordinances became effective. The urgency ordinance lasted a total of 63 days. During that time, Scaroni had no possessory interest in the premises, and therefore no right to use the premises for any purpose, much less a boardinghouse. Even if a city ordinance had permanently deprived Olivera from using the premises as a boardinghouse, the City would not have violated Olivera's rights. The City has the right to change the zoning.

Thus, in *Stubblefield Construction Co. v. City of San Bernardino*, *supra*, 32 Cal.App.4th 687, a property owner submitted plans to the city to construct multiple three-story apartment buildings. At the time the owner submitted the plans, the property was zoned for such apartments as a permitted use. In response to public opposition, the city amended its ordinance to allow only two-

story apartments as a permitted use and three-story apartments as a conditional use. The owner did not apply for a conditional use permit. Instead, it sued the city under section 1983 for deprivation of due process and equal protection.

The Court of Appeal reversed judgment for the property owner. The court said that a property owner acquires a vested right to a particular use when it has performed substantial work and has incurred substantial liabilities in good faith reliance on a permit issued by the government. (*Id*. at p. 707.) In the absence of such a vested right, the property owner has no right to a particular use of the property. (*Id*. at p. 708.) Here, Olivera points to no substantial work performed or liabilities incurred in converting its apartments to a boardinghouse. The apartments were never converted.

Targeting

That Scaroni's proposed use was the impetus for the City's actions does not mean the City unfairly discriminated against the project. (*Delta Wetlands Properties v. County of San Joaquin*) (2004) 121 Cal.App.4th 128, 149.) The evil sought to be remedied will often not come to the attention of the authorities until a use is proposed or a permit application is made. (*Ibid*.)

In any event, for the reasons previously stated, Olivera's contention that the City violated section 1983 by "targeting" the Scaroni transaction must fail. If the City targeted Scaroni for anything, it had no effect on his or anyone else's rights.

Olivera's reliance on *Young Apartments, Inc. v. Town of Jupiter* (11th Cir. 2008) 529 F.3d 1027, is misplaced. Young brought an action under section 1983. Young alleged that its apartments were occupied by Hispanic workers. The presence of such workers became a topic of concern for the town's citizens. In

part as a result of this concern, the town adopted an ordinance limiting the number of people who could occupy a housing unit.

The town then engaged in excessive and selective housing inspections. The town's purpose was to drive away Hispanic immigrant workers by targeting their landlords. The town conducted a pre-dawn raid without a warrant looking for occupancy limit violations. The town cited Young for occupancy violations as well as for physical defects that resulted from a hurricane. The town set impossible time limits to repair the damage. When Young was unable to meet the deadline, the town condemned 14 of the apartment's 30 units. The enforcement was selective. Hundreds of other properties in town had unrepaired hurricane damage. As a result of the town's action in condemning the units, a party who had contracted to purchase the property cancelled the transaction. The trial court granted the town's motion to dismiss the complaint on the ground, among others, that Young lacked standing. The Court of Appeals reversed and remanded for the trial court to consider whether the town adopted and enforced its ordinance with intent to discriminate against Hispanic immigrant tenants.

Here, unlike the facts in *Young*, there was no selective and excessive enforcement: no pre-dawn raid, no citations issued, no impossible deadlines for repairs, and no condemnation of any apartments. Scaroni cancelled the contract because he wanted to do something with the apartments that no one ever had the right to do.

Due Process

Olivera argues there is substantial evidence to support the jury's finding that the ordinances violated due process.

It is a judicial function to determine the constitutionality of a statute or ordinance, not a question of fact for the jury. (*Johnson v.*

Goodyear Mining Co. (1899) 127 Cal.4, 7.) In assessing whether a statute or ordinance violates due process, we do not inquire into subjective motive of the governmental entity; instead, we view the statute or ordinance objectively to determine whether the regulation may be said to substantially advance a legitimate governmental purpose. (*Breneric Associates v. City of Del Mar*, *supra*, 69 Cal.App.4th at p. 185.)

Here, the trial court found that the permanent ordinance satisfies due process. Of that there is no doubt. An ordinance regulating the density of residential occupancy is rationally related to such legitimate governmental concerns as the health and safety of the occupants, the burden on the City's infrastructure, and the capacity of the City to provide services.

The urgency ordinance is also reasonably related to the legitimate governmental purpose of briefly prohibiting boardinghouses while it considered zoning changes. Government Code section 65858, subdivision (a) provides that a city "to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time." That is what the City did here.

Olivera argues there was no urgency. But ordinance 189 allowed boardinghouses as a permitted use in all R-3 zones. Any property owner in an R-3 zone could convert his property to a boardinghouse at any time. Such conversions could result in the vesting of rights to continue the use in spite of any zoning change. (See *Stubblefield Construction Co. v. City of San Bernardino*, *supra*, 32 Cal.App.4th at p. 707.)

Ordinances imposing a moratorium so that a city can consider zoning changes have been approved as urgency ordinances for decades. (See, e.g., *Lima v. Woodruff* (1930) 107 Cal.App. 285, 286 ["The recitals of the emergency in the ordinance before us are grounded on the statement of the Supreme Court in the Miller case that 'it would be destructive of the (zoning) plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan'"], quoting, *Miller v. Board of Public Works* (1925) 195 Cal. 477, 496.)

The City ultimately enacted a permanent ordinance that allowed boardinghouses in R-3 zones as permitted uses. But that does not mean the City was remiss in imposing an urgency moratorium to consider the matter.

DISPOSITION

Because the temporary urgency ordinance is valid, the award of damages is reversed. In all other respects, the judgment is affirmed. Costs are awarded to the City.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Jed Beebe, Judge

Superior Court County of Santa Barbara

Andre, Morris & Buttery, Dennis D. Law, Amber L. Simmons; and Diane Matsinger for Plaintiffs and Appellants.

Hall, Hieatt & Connely, Clayton U. Hall and Molly E. Thurmond for Defendant and Appellant.